Supreme Court, U.S.
F I L E D
APR 30 1996
CLERK

No. 95-1387

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Petitioner,
v.
WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD; THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS,
Respondents.

On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals

REPLY BRIEF OF PETITIONER

John P. Davis
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
Butte, MT 59701-4898
(406) 491-2904

Elizabeth A. Phelan
Counsel of Record
Heather R. Hanneman
Holland & Hart LLP
555 Seventeenth St., Suite 3200
Denver, CO 80202
(303) 295-8000

Matthew W. Williams
Williams, Jent & Dockins
506 East Babcock
Bozeman, MT 59715
(406) 586-1373

Pamela Sbar
Atlantic Richfield Company
555 Seventeenth St., Suite 1602
Denver, CO 80202
(303) 293-4155

Counsel for Petitioner Atlantic Richfield Company

16 pp

No. 95-1387

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Petitioner,
v.
WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD; THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS,
Respondents.

On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals

REPLY BRIEF OF PETITIONER

John P. Davis
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
Butte, MT 59701-4898
(406) 491-2904

Elizabeth A. Phelan
Counsel of Record
Heather R. Hanneman
Holland & Hart LLP
555 Seventeenth St., Suite 3200
Denver, CO 80202
(303) 295-8000

Matthew W. Williams
Williams, Jent & Dockins
506 East Babcock
Bozeman, MT 59715
(406) 586-1373

Pamela Sbar
Atlantic Richfield Company
555 Seventeenth St., Suite 1602
Denver, CO 80202
(303) 293-4155

Counsel for Petitioner Atlantic Richfield Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY OF THE PETITIONER 1

I. 1

II. 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Aaron v. National Union Fire Ins. Co.,
876 F.2d 1157 (5th Cir. 1989),
cert. denied, 493 U.S. 1074 (1990) 1

Avco Corp. v. Aero Lodge,
390 U.S. 557 (1968) 5

Caterpillar, Inc. v. Williams,
482 U.S. 386 (1987) 5, 9

Deford v. Soo Line, 867 F.2d 1080 (8th Cir.),
cert. denied, 492 U.S. 927 (1989) 2, 3

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 2, 5, 9

International Paper v. Ouellette, 479 U.S. 481 (1987) 9

Lebron v. National R. R. Passenger Corp.,
115 S. Ct. 961 (1995) 6

Mayor and Council v. Klockner & Klockner,
811 F. Supp. 1039 (D.N.J. 1993) 10

Metropolitan Life Ins. Co. v. Taylor,
481 U.S. 58 (1987) 1, 2, 3, 6

Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R. Co.,
858 F.2d 936 (3d Cir. 1988) 3

Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) 7, 8

Rice v. Panchal, 65 F.3d 637 (7th Cir. 1995) 1, 2

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 9

Voluntary Purchasing Groups, Inc. v. Reilly,
889 F.2d 1380 (5th Cir. 1989) 7, 8

Warner v. Ford Motor Co., 46 F.3d 531
(6th Cir. 1995) (*en banc*) 1

Yee v. City of Escondido, 112 S. Ct. 1522 (1992) 6

STATUTES

42 U.S.C.A. § 9606(a) (1995) 3, 6, 9, 10

42 U.S.C.A. § 9613(b) (1995) 6

42 U.S.C.A. § 9613(h) (1995) . . . . . passim

42 U.S.C.A. § 9659(a)(1) (1995) 1, 2, 5, 6

42 U.S.C.A. § 9659(h) (1995) 2, 3, 5

LEGISLATIVE HISTORY

132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986)
(Rep. Glickman) 4

REPLY OF THE PETITIONER

I.

1. Respondents do not refute ARCO's showing of significant conflicts, among the courts of appeals, and with this Court's decisions, concerning the test for complete preemption. Pet. 14-17, 19-21. Respondents also do not challenge ARCO's showing that Congress specifically intended that *all* litigation seeking to challenge a response action or obtain review of pertinent EPA orders before and during a clean-up -- regardless of whether the claim arises under federal or state law -- would be removable to federal court and subject to scrutiny under section 9613(h) of CERCLA, 42 U.S.C.A. § 9613(h) (1995). Pet. 18-19. Instead, respondents offer a host of arguments that confuse or misapprehend the controlling legal principles, misunderstand ARCO's arguments, or misstate the record.

2. Respondents overlook the significant conflict among the circuit courts in applying the first prong of the complete preemption doctrine, *i.e.*, whether the federal statute "'displace[s] entirely any state cause of action' within the scope of the federal statutory provision." Pet. 14.

a. For instance, respondents dismiss ARCO's reliance on *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995), Pet. 15, on grounds that *Rice* is consistent with this Court's decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Opp. 10. The point is that *Rice* conflicts with decisions of other circuit courts. Pet. 15. Respondents' claim that *Rice* comports with *Taylor* underscores the significance of the conflicts among the circuit courts and the need for this Court's review. Pet. 14-15, 19-21.

b. Respondents misread *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990). Opp. 10. *Aaron* held that "[t]here is no federal cause of action the plaintiffs could have pleaded" under the federal statute at issue in lieu of their state law claims. 876 F.2d 1165. Thus, the Fifth Circuit required that the federal statute afford a cause of action that replaces or, in the words of the Sixth Circuit, supersedes the state law claim. *Id.* at 1164-65; *Warner v. Ford Motor Co.*, 46 F.3d 531, 534 (6th Cir. 1995) (*en banc*).

3. Respondents' allegations can be read to support a claim under section 9659(a)(1) of CERCLA, 42 U.S.C.A. § 9659(a)(1) (1995), permitting the Court to consider the test adopted by the Third, Fifth and Sixth Circuits for the first prong of the complete preemption doctrine. Pet. 15-16.

a. Respondents assert this inquiry does not arise here because "as masters of their complaint, [respondents] did not ask for relief under § 9659(a)(1)." Opp. 11. But the doctrine of complete preemption always involves a claim that is pled as a state law claim; the issue is whether, notwithstanding the plaintiff's attempt to cloak the claim in a state-law garb, it is, in fact, a federal law claim. *Taylor*, 481 U.S. at 63-67. Pet. 14.

b. In fact, respondents confirm that their allegations can be read as claims for violation of the EPA orders, and thus as within the scope of section 9659(a)(1). Opp. 3, 4; *id.* at 24 ("the law which forms the basis of the complaint is consistent with the law which EPA has ordered ARCO to obey").

4. Section 9659(h), 42 U.S.C.A. § 9659(h) (1995), and its incorporation of section 9613(h) by reference, permits the Court to review the Seventh and Eighth Circuits' test for the first prong of the complete preemption doctrine. Pet. 16-17.

a. Resorting to principles of "ordinary preemption", respondents argue that section 9659(h) was intended to preserve, not preempt, state causes of action. Opp. 12-13. This argument is irrelevant because ARCO relies on complete preemption, not ordinary preemption. Under the complete preemption doctrine, respondents' claims are necessarily federal in character, regardless of how they were pled, and therefore, are removable to federal district court. Pet. 14. Ordinary preemption does not transform the state law character of the claims; it operates as a defense to them and is not a basis for removal. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983).

b. Respondents' arguments concerning *Rice*, 65 F.3d at 640, and *Deford v. Soo Line*, 867 F.2d 1080, 1085-86 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989), Opp. 13, reflect respondents' failure to understand section 9659(h) and how it affects state law claims within its scope. Because section 9659(h) displaces those claims and furnishes a modified federal remedy in their place, Pet. 16-17 & 18-23, section 9659(h) is precisely the kind of statutory provision that satisfies the test *Rice* and *Deford* used for the first prong of the complete preemption doctrine.

5. Respondents misapprehend ARCO's arguments concerning the division in the circuit courts as to the second prong of the complete preemption doctrine. Pet. 17-19.

a. Respondents attempt to gloss over the conflict between the Third and Eighth Circuits on this issue. Opp. 14. Yet the decisions of these courts belie respondents' conclusory assertions: each describes the test differently, and after applying its respective test, each reaches a different conclusion as to congressional intent under the same statute, the Railway Labor Act. *See Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R. Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *Deford*, 867 F.2d at 1085-86.

b. Respondents question the need to consult the legislative history to ascertain congressional intent. Opp. 14, 15. This Court has emphasized that complete preemption requires "explicit direction from Congress" and has looked not only to statutory language but also to legislative history for that direction. *Taylor*, 481 U.S. at 64-65. Respondents offer no persuasive response to ARCO's showing that Congress gave such direction as to state law claims within the scope of section 9659(h). Pet. 18-19.

(1) ARCO's position is not, as respondents contend, that section 9659(h) "mak[es] all federal, state, or common law claims removable to federal court" in the abstract. Opp. 15; *see also id.* at 24 (arguing that under ARCO's view, "all state law tort claims would be pre-empted"). Rather, section 9659(h) makes claims within its scope, including state law claims such as respondents', removable to federal court *for scrutiny under section 9613(h)*. Pet. 18. State law claims that are within the scope of section 9659(h) and that may be found to be "challenges" to a response action or to seek "review" of a section 9606(a) order within the meaning of section 9613(h) are subject to removal.

(2) If the plaintiff opposes removal and files a motion to remand to state court, the federal court will decide the issue whether the claims constitute "challenges" to response actions or seek "review" of a section 9606(a) order. If the federal court answers this question in the negative, then the motion to remand will be granted and the claims will go forward in state court. If the federal court concludes that the claims are "challenges" or seek "review" of an order, then the motion to remand will be denied and the complaint will be dismissed, without prejudice to refiling at the conclusion of the clean-up. This procedure, which simply assures

that section 9613(h) is given effect, is precisely the "result . . . intended by Congress." Opp. 24. *See* Pet. 18-19.[1]

c. Respondents offer no response to ARCO's showing that Congress specifically intended that claims within the scope of section 9659(h) filed in state court would be removable to federal court. Pet. 19.

(1) Respondents' reliance on Representative Glickman's comments concerning diversity of citizenship, Opp. 16, is misplaced. He specifically explained that "this reference to 28 U.S.C. 1332 does *not* create any additional rights or opportunities to obtain review of a Superfund response action." 132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986) (Rep. Glickman) (emphasis added). Thus, respondents' hypothetical case -- a state law cause of action filed in state court, Opp. 16 -- is subject to removal to federal court for scrutiny under section 9613(h), as Representative Glickman's other comments confirm. Pet. 19; *see also supra* at 3.

(2) Respondents also argue that CERCLA was not intended to preempt other law in general, Opp. 16, and that Congress has traditionally deferred to state water law, *id.* at 17 n.3. Neither of these arguments is pertinent to the issue before the Court. ARCO is arguing that under the doctrine of complete preemption, respondents' state law claims are subject to removal to federal district court and analysis under section 9613(h). Pet. 14-25. If section 9613(h) is found to apply, respondents' claims will not be extinguished, but rather altered as to when they can be brought and the relief they can afford. Pet. 15-21.

(3) Respondents misstate EPA's views "concerning the remedy available to the [r]espondents in the instant case." Opp. 16. Respondents' quotation from a brief the United States filed in the district court has some omissions. The brief reads as follows:

> To the extent that these claims do not challenge or seek to block the response action at the Warm Springs Ponds operable unit, they do not

---

[1]Respondents' hypothetical negligence case, Opp. 24, would be subject to this procedure. The outcome would depend on whether the case was a "challenge" to the response action or sought "to review" the EPA order. If not, the case would not be removed or would be remanded to state court.

appear to implicate CERCLA. *By submitting that this Court lacks jurisdiction to forbid ARCO's performance of the response action at the Mill-Willow Bypass and the Warm Springs Ponds, the United States does not take a position on whether plaintiffs are entitled to some form of relief (such as money damages) to redress an alleged violation of state-law water rights.*[18] If, in fact, plaintiffs' water rights have been impaired, CERCLA does not bar a remedy unless that remedy would involve review of the propriety of, or possible injunction against, the performance of an ongoing CERLCA response action.

[18] *Based upon EPA's review of the evidence, EPA has decided not to bring an action to enforce the terms of the section 106(a) order requiring ARCO to comply with Montana state water law.*

Brief of Intervenor United States in Support of Dismissal of Claims for Injunctive Relief, filed Feb. 21, 1992, at 17-18 (emphasis in italics added). These omissions (shown in italics) refute respondents' implicit suggestion, Opp. 3, 24, that EPA concurred in their position that ARCO was viclating EPA's orders.

6. ARCO showed that the Ninth Circuit's decision to remand conflicts with this Court's decisions, regardless of whether respondents' claims fall within section 9659(a)(1) or section 9659(h). Pet. 19-21.

a. Respondents again assert that they did not plead any section 9659(a)(1) claims. Opp. 18. But the issue is whether the claims are in fact federal law claims regardless of how respondents described them. *See supra* at 2; Pet. 14. The claims fall within section 9659(a)(1), Pet. 15-16 & n.5, and the Ninth Circuit's decision to remand them conflicts with *Taylor*, 481 U.S. at 64-66. *See* Pet. 20.

b. Respondents' arguments concerning section 9659(h) and *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), Opp. 18-19, again confuse ordinary preemption and complete preemption. *See supra* at 2. *Caterpillar*, 482 U.S. at 391 n.4, is pertinent because it rejects the notion that federal law must "both displace and supplement state law." Pet. 20.

c. Contrary to respondents' assertions, Opp. 19, section 9659(h) satisfies *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968), and claims within the scope of section 9659(h) "necessarily 'arise[ ] under' federal law," *Franchise Tax Board*, 463 U.S. at 24. *See* Pet. 18-19, 20-21. Any other

conclusion would defeat Congress' express directive that such claims are removable to federal court for scrutiny under section 9613(h). Pet. 18-19. As for respondents' effort to distinguish *Taylor*, Opp. 19-20, the text and legislative history of section 9613(h) surely constitute the requisite "explicit direction from Congress" to permit removal that *Taylor* requires. *Taylor*, 481 U.S. at 64; Pet. 18-19, 21.

7. Respondents suggest that ARCO is foreclosed from relying on the doctrine of complete preemption because the Ninth Circuit did not specifically address it. Opp. i, 1, 6, 7, 9. In fact, ARCO (a) removed the *West Side* case on grounds that the case was within the exclusive jurisdiction of the federal district court under section 9613(b), 42 U.S.C.A. § 9613(b) (1995), and (b) relied on the doctrine of complete preemption in opposing the motion to remand. Pet. 9. Similarly, ARCO removed the *Beck* action on the ground that the federal district court had subject matter jurisdiction, and opposed the motion to remand on the ground that the claims had been artfully pled to avoid federal subject matter jurisdiction. *Id.* at 11. In the Ninth Circuit, ARCO argued, *inter alia*, that to the extent respondents asserted that ARCO had not routed and treated the water in accordance with EPA's orders, their remedy was a suit under section 9659(a)(1), and therefore barred under section 9613(h). Briefs of Atlantic Richfield Co., 9th Cir. Case Nos. 94-35539, 94-35552, 94-35487 and 94-3555, filed Oct. 11, 1994, at 32-33.

"Once a federal claim is presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532 (1992); *Lebron v. National R. R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995). In light of the arguments ARCO made below, ARCO now "possesses the ability to frame the question to be decided [by this Court] in any way [it] chooses, without being limited to the manner in which the question was framed below." *Yee*, 112 S. Ct. at 1532.

II.

1. The lower courts are divided on what claims constitute "challenges" to a response action or seek "to review [a section 9606(a)] order" within the meaning of section 9613(h). Pet. 21-23. As to the former provision, ARCO showed that the circuits are divided over whether "challenges" should be read according to its plain meaning, or should be subject to limitations such as those the Ninth Circuit imposed here. Pet. 22-23.

a. Respondents misread *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380 (5th Cir. 1989), and *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (*en banc*). Both cases squarely reject the notion that "delay" of a cleanup is a prerequisite to finding a "challenge" within the meaning of section 9613(h). 889 F.2d at 1388-89; 947 F.2d at 1513. Both interpret "challenge" according to its ordinary meaning, noting that such an interpretation is most consistent with (a) the plain language of section 9613(h); (b) Congress' concern, reflected in the legislative history, that pre-enforcement review would increase response costs and discourage settlements and voluntary cleanups; and (c) the recognition that pre-enforcement review "could force the EPA to confront inconsistent results." 889 F.2d at 1388-90; 947 F.2d at 1512-13.

b. Respondents' assertion that their suit is not barred "because EPA will not be involved in [r]espondents' state law action against ARCO," Opp. 22, is erroneous. Section 9613(h) does not require that EPA "be involved" in the suit; section 9613(h) applies if the suit constitutes a "challenge" to the response action or seeks "review" of the EPA order. In any event, the Ninth Circuit remanded the case to state court for determination of whether ARCO's routing and treatment of the waters was "in conformity with the EPA's order." Pet. App. 5a. The litigation will focus on the meaning of EPA's orders, including the provisions concerning compliance with state water law, and could lead to inconsistent interpretations of them.

c. Respondents' reliance on an excerpt from the United States' brief in opposition to ARCO's motion to dismiss, Opp. 22, is misplaced. There, the United States responded to ARCO's argument that respondents' exclusive remedy was an action for inverse condemnation against the United States for an alleged taking of water rights without just compensation; the United States argued that ARCO's position was correct only if principles of *ordinary* preemption defeated respondents' claims against ARCO, and that those principles did not do so. CR 101 at 9-10, 11-19. In any event, the United States' position concerning the relationship between the damages claims and ARCO's performance under CERCLA is incorrect. Pet. 23-24; *infra* at 9.

2. Respondents link "challenges" with ordinary preemption, arguing that state law is not preempted unless compliance with both federal and state law is a "physical impossibility." Opp. 24.[2]

a. Respondents' premise -- that ordinary preemption is at issue -- is erroneous. *See supra* at 2. Thus, their arguments concerning physical impossibility, one aspect of ordinary preemption, are inapposite. Respondents implicitly suggest that their claims do not constitute "challenges" unless ARCO can show that it is unable to comply with both EPA's orders and the state law respondents are seeking to enforce. Opp. 24. This argument highlights the conflict among the circuit courts in interpreting "challenges" because both the First and Fifth Circuits have refused to read any such restrictions into the plain language of the statute. *Reardon*, 947 F.2d at 1513; *Voluntary Purchasing*, 889 F.2d at 1388-89.

b. Respondents mistakenly rely on arguments the United States made concerning compliance with state and federal law. Opp. 24. The passage respondents quote is from the United States' memorandum in opposition to ARCO's motion to dismiss, CR 101 at 16, and concerns ordinary preemption, *not* complete preemption, or the meaning of "challenge." To the extent respondents read the passage as applying to "challenge," it is incorrect for the reasons set forth in (a) and (d) of this paragraph.

c. Respondents' reliance on the Ninth Circuit's comment concerning purchase of senior water rights, Opp. 24, Pet. App. 5a n.6, is misplaced. The Ninth Circuit was addressing ARCO's argument that respondents' exclusive remedy was an inverse condemnation claim against the government, not whether "physical impossibility" affected the meaning of "challenge" under section 9613(h). In any event, the court's comment concerning purchase of senior water rights was erroneous. *See* Pet. 24 n.8.

d. Even if "physical impossibility" were pertinent to the meaning of "challenge" as used in section 9613(h), a determination of whether ARCO can comply both with state water law and EPA's orders requires an actual

---

[2]Respondents make factual assertions that are not supported in the record and that ARCO disputes. *See, e.g.*, Opp. 1 (ARCO sold water rights for the treatment ponds in 1985); *id.* 24 (senior water rights were available for ARCO's purchase).

"review" of those orders. Thus, respondents' claims are barred by the provision of section 9613(h) precluding such "review." Pet. 23.

3. ARCO argued that even if the Ninth Circuit's interpretation of "challenge" were correct, its conclusion that claims for compensatory and punitive damages would not involve altering the EPA order or interfere with the cleanup, Pet. App. 5a, is inconsistent with *International Paper v. Ouellette*, 479 U.S. 481 (1987), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Pet. 23-24.

a. Respondents incorrectly claim that ARCO "asserts that *International Paper* . . . enunciates a *per se* ban on compensatory and punitive damages suits against polluters." Opp. 25. Rather, ARCO showed that the Ninth Circuit's view of what claims constitute "challenges" conflicts with this Court's understanding, expressed in *International Paper* (and *Garmon*), of the impact a judgment for damages can have on a defendant's conduct, including conduct taken pursuant to government order. Pet. 24.

b. Respondents attempt to distinguish *International Paper*. Opp. 25-26. None of these arguments addresses this Court's recognition that a judgment for damages under Vermont law, arising from activities authorized by a New York permit, would "at a minimum" cause the defendant "to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability." 479 U.S. at 495. The Ninth Circuit's view of the impact on ARCO of a state court judgment for compensatory and punitive damages, Pet. App. 5a, is directly contrary to this rationale.

4. The Ninth Circuit's decision conflicts with the Seventh Circuit's reading of the section 9613(h) provision that withdraws jurisdiction to "review any order issued under section 9606(a)." Pet. 23.

a. Respondents argue that this provision applies only when claims are "substantially dependent" upon interpretation of the order. Opp. 23 (citing *Caterpillar*, 482 U.S. at 395 and *Franchise Tax Board*, 463 U.S. at 29 n.28). First, this view finds no support in the plain meaning of the statutory language, which denies jurisdiction to "review any order", without qualification. Second, *Caterpillar*, and the footnote in *Franchise Tax Board* on which respondents rely, address what claims "arise under" section 301 of the Labor Management Relations Act (LMRA), *not* what claims seek "review of any order" within the meaning of section 9613(h) of CERCLA. Third, even if respondents' interpretation were correct, this

provision would apply because the Ninth Circuit held that respondents' claims *are* wholly dependent on a "review" and interpretation of EPA's orders. Pet. App. 5a (claims require proof that ARCO's diversions were not in conformity with EPA's orders).

b. Respondents err in relying on *Mayor and Council v. Klockner & Klockner*, 811 F. Supp. 1039 (D.N.J. 1993). In quoting the opinion, respondents omit the court's reference to "ERA" in the phrase "whether an *ERA* action could proceed . . . ." *Id.* at 1055 (emphasis added). *See* Opp. 23. The "ERA" is the Environmental Rights Act, N.J.S.A. 2A:35A-1; it entitles private citizens to bring suit to enforce environmental statutes only in "those instances where the government has not acted." *Id.* at 1054. *Klockner* holds that the kind of "review" of governmental action necessary to determine whether the ERA action could proceed does not constitute "review of any [section 9606(a)] order" within the meaning of section 9613(h). *Id.* at 1055-56.

CONCLUSION

For the reasons set forth above and in the petition, certiorari should be granted.

Respectfully submitted,

John P. Davis
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
Butte, MT 59701-4898
(406) 491-2904

Elizabeth A. Phelan
Counsel of Record
Heather R. Hanneman
Holland & Hart LLP
555 Seventeenth St., Suite 3200
Denver, CO 80202
(303) 295-8000

Matthew W. Williams
Williams, Jent & Dockins
506 East Babcock
Bozeman, MT 59715
(406) 586-1373

Pamela Sbar
Atlantic Richfield Company
555 Seventeenth St., Suite 1602
Denver, CO 80202
(303) 293-4155

Counsel for Petitioner Atlantic Richfield Company

April 10, 1996